

No. 226.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILROAD
COMPANY,

Plaintiff in Error,

vs.

JOHN McCORMICK,

Defendant in Error.

TRANSCRIPT OF RECORD.

*In Error to the Circuit Court of the United States for the
District of Montana.*

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*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD COM- PANY,	} Plaintiff,
vs.	
JOHN McCORMICK,	} Defendant.

Be it remembered, that on the 12th day of January, 1891, the plaintiff above named filed its complaint herein, which said complaint is in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, District of
Montana.*

NORTHERN PACIFIC RAILROAD COM- PANY,	} Plaintiff,
vs.	
JOHN McCORMICK,	} Defendant.

Complaint.

Now comes said plaintiff, and for cause of action against said defendant, complains and alleges:

I.

That said plaintiff is a corporation, created by and organized and existing under an Act of Congress of the United States, approved July 2, 1864, entitled,

“An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast by the Northern route,” and those certain Acts and joint resolutions supplemental thereto and amendatory thereof.

II.

That by the terms of said Act of Congress, approved July 2, 1864, plaintiff was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by plaintiff, within the territory of the United States, on a line north of the 45th degree of latitude to some point on Puget Sound. And there was granted to plaintiff by the Congress of the United States of America every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as plaintiff might adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passed through any State, and whenever on the line thereof the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

III.

That it was provided, in and by Section Six of the said Act, that the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route thereof was fixed, and as fast as should be required by the construction of said railroad, and that the odd sections of land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed, except by plaintiff, as provided in said Act.

IV.

That plaintiff duly accepted the terms, conditions and impositions of said Act, and signified such acceptance in writing, under its corporate seal, executed pursuant to the direction of its Board of Directors first had and obtained, and within two years after the passage of said Act, to-wit: December 29, 1864, served such acceptance on the President of the United States.

V.

That the general route of said railroad, extending through the Territory of Montana, was duly fixed February 21, 1872, and that the following described land, to-wit: south half of northwest quarter and west half of southwest quarter of Section 21, Township 13 North, of Range 18 West, P. M. Montana, was on and within forty miles of the general route of said railroad so fixed as aforesaid, and that said land was, on said February 21, 1872, public land to which the United States had full title not reserved, sold, granted

or otherwise appropriated, and free from pre-emption or other claims or rights,

VI.

That at the date of the passage of said act July 2, 1864, and at the date of fixing said line of general route of said railroad, to-wit: February 21, 1872, no part of the said south half of northwest quarter and west half of southwest quarter of said Section 21, was known mineral land, and that in truth and in fact said land was not mineral land, nor was any part of said last described land within any exception from said grant.

VII.

That thereafter, to-wit: July 6th, 1882, plaintiff definitely fixed the line of its said railroad extending opposite to and past said south half of northwest quarter and west half of southwest quarter of said Section 21, Township 13 North, of Range 18 West, P. M. Montana, and filed a plat thereof in the office of the Commissioner of the General Land Office. That said land is on and within forty miles of said line of railroad, so definitely fixed as aforesaid.

VIII.

That thereafter, plaintiff duly constructed and completed that portion of said railroad and telegraph line extending on, over and along the line of definite location of said railroad so fixed as aforesaid; and thereupon the President of the United States appointed three commissioners to examine the same; and it appearing to the said commissioners that that portion of said railroad and telegraph line had been completed in a good, substantial and workmanlike man-

ner as in all respects required by said act of July 2, 1864, and the acts supplementary thereto and amendatory thereof the said commissioners so reported to the President of the United States, and said President of the United States duly accepted said line of railroad and telegraph so constructed and completed as aforesaid.

IX.

That at the date of so definitely locating said line of railroad, and of the filing of a plat thereof in the office of the Commissioner of the General Land Office, to-wit: July 6th, 1882, the said south half of the northwest quarter and west half of southwest quarter of Section 21, Township 13 North, of Range 18 West, P. M. Montana, was not known to be mineral land, and was, in fact and in truth, agricultural land.

That said land was on said day public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights.

X.

That by reason of the foregoing facts, said plaintiff became on July 6th, 1882, the owner, and seized in fee simple of said land, and said land then became, has ever since remained, and now is the property of the plaintiff, to which plaintiff is entitled without let or hindrance from said defendant. That the United States has neglected, failed and refused to issue to said plaintiff a patent for said land; and that heretofore, to-wit: May 1st, 1889, the said plaintiff being possessed of the said premises, the said defendant did wrongfully and unlawfully, without the consent and

against the will of the plaintiff, enter thereon, and ousted plaintiff therefrom, and from that time hitherto hath remained and yet is wrongfully and unlawfully in possession of said south half of north-west quarter, and west half of southwest quarter of Section 21, Township 13 North, of Range 18 West, P. M. Montana, and withholds the same from plaintiff, to its damage, in the sum of five hundred dollars.

XI.

That said described land is of the value of over five thousand dollars.

Wherefore, plaintiff prays judgment for the restitution of said premises, and for five hundred dollars, and for its costs and disbursements herein.

CULLEN, SANDERS & SHELTON,
F. M. DUDLEY,

Attorneys for Plaintiff.

STATE OF MINNESOTA, }
County of Ramsey. } ss.

F. M. Dudley, being duly sworn, deposes and says: That he is an officer of said plaintiff, to-wit, its general land attorney; that the facts stated in the foregoing complaint are true, to the best of his knowledge, information and belief.

F. M. DUDLEY.

Subscribed and sworn to before me, this 6th day of Jan. A. D. 1891.

(Seal.)

P. P. STARIN,
Notary Public.

[Endorsed]: Title of Court and Cause, No. 115. Complaint. Filed Jan. 12, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the said 12th day of January, 1891, a summons was duly issued in said cause, which said summons, together with the return of service thereon, is in the words and figures as follows, to-wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff,

vs.

JOHN McCORMICK,

Defendant.

Action brought in the said Circuit Court, and the complaint filed in the office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis and Clarke.

Summons.

The President of the United States of America,
Greeting: To John McCormick.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said court, in the City of Helena, and County of Lewis and Clarke, within twenty days after the service on you of this summons—or judgment by default will be taken against you.

The said action is brought to recover the possession of the south half of northwest quarter and west half of Section 21, Township 13 North, of Range 18 West P. M. Montana, and to recover damages in the sum of five hundred dollars for withholding said possession and for its costs and disbursements herein. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the court for the relief demanded therein.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 12th day of January, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the 115th.

GEO. W. SPROULE,

Clerk.

(Seal of Court.)

[Endorsed]: United States Marshal's office, District of Montana. I hereby certify that I received the within writ on the..... day of January, 1891, and personally served the same on the 19th day of January, 1891, by delivering to, and leaving with John McCormick, said defendant named therein personally, at the County of Missoula in said District, a certified copy thereof, together with a copy of the complaint, certified to by Geo. W. Sproule, Clerk, attached thereto. Helena, January 20th, 1891. Wm. F. Furay, U. S.

Marshal. By W. F. Parker, Deputy. Summons. Cullen, Sanders & Shelton, F. M. Dudley, Plaintiff's Attorneys. Filed February 4th, 1891. Geo. W. Sproule, Clerk.

And thereafter to-wit, on the 4th day of February, A. D. 1891, the defendant filed his demurrer herein which said demurrer is in words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Montana.

NORTHERN PACIFIC RAILROAD COM- PANY,	Plaintiff,	}
vs.		
JOHN McCORMICK,	Defendant.	

Demurrer.

Now comes the above-named defendant and demurs to the complaint of the plaintiffs herein filed, and for cause of demurrer assign:

I.

That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendant.

II.

That said above-entitled court has no jurisdiction of the subject matter of said action, and that said complaint does not state facts sufficient to confer jurisdiction.

W. M. BICKFORD,
Attorney for Defendant.

I hereby certify that I am one of the attorneys for the defendant in the above-entitled action:

That in my opinion the demurrer herewith tendered is well founded in point of law, and is filed in good faith for the purpose of raising questions of law therein stated.

W. M. BICKFORD,
Attorney for Defendant.

[Endorsed]: Title of Court and Cause. Demurrer.
Filed Feb. 4, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 4th day of May, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

Order Overruling Demurrer, etc.

April Term. A. D. 1891, Monday, May 4th, 1891.

Court convened pursuant to adjournment.

Present, Honorable HIRAM KNOWLES, United States District Judge.

No. 115. Northern Pacific Railroad Company vs. John McCormick.

The demurrer in this cause was ordered passed: Thereafter said demurrer was by consent overruled and defendant given until May 25th, 1891, to file an answer.

And thereafter, to-wit, on the 25th day of May, 1891, the defendant filed his answer herein, which said answer is in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, District of
Montana.*

NORTHERN PACIFIC RAILROAD COM-
PANY,

Plaintiff,

vs.

JOHN McCORMICK,

Defendant.

Answer.

By way of answer to the plaintiff's complaint herein filed, the defendant denies:

That the land mentioned and described in said complaint as being the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 21, Tp. 13 N., R. 18 W., Principal Meridian of Montana, was on the 21st day of February, 1872, or any date subsequent thereto public land, to which the United States had full title.

Denies—That the land was not reserved, sold or granted or otherwise appropriated, or that the same was free from pre-emption, or other claims or rights.

Denies—That the land was in any other or different condition than hereinafter mentioned and described in this answer.

Denies—That the land mentioned and described in said complaint was on the 6th day of July, 1882, public land of the United States, to which the United States had full title, and alleges:

That said land was at the said date appropriated in the manner hereinafter set forth, and was reserved and excepted from the grant to the Northern Pacific Railroad Company.

Denies—That by reason of the facts alleged in plaintiff's complaint, or of any other facts, the plaintiff became on the 6th day of July, 1882, or at any other time the owner, or seized in fee simple, or otherwise, of the land described in said complaint, and also denies that said land then or at any time became, or that the same has ever since remained, or that now is the property of the plaintiff, or that the plaintiff is entitled either without let or otherwise to have the said land or any part or parcel thereof.

Denies—That heretofore on May 18th, 1889, or at any time the plaintiff was possessed of said land, or any part or parcel thereof.

Denies—That said plaintiff either wrongfully or unlawfully, or in any other way entered upon said land, or that he ousted the plaintiff therefrom, or that the said defendant remains, or has ever remained, wrongfully or unlawfully in the possession of said land or any part or parcel thereof.

Denies—That the plaintiff is damaged in the sum of five hundred (\$500.00) dollars, or any other sum or amount by any act or acts done by the defendant herein.

Denies—That said land is of the value of five thousand (\$5,000) dollars, or of any other greater value than two thousand five hundred (\$2500) dollars.

For a further answer and by way of new matter constituting a defense to plaintiff's alleged cause of action the defendant alleges:

First—that he is a citizen of the United States, over the age of twenty-one years, and during all the times herein mentioned has been duly qualified to enter the

land of the United States, and to make a pre-emption or a homestead entry under said laws.

Second—That on or about the.....day of July, 1862, one W. B. S. Higgins, being at said time a citizen of the United States, over the age of twenty-one years, and duly qualified under the laws of the United States to make a pre-emption or homestead filing, entered into and upon that certain tract, piece or parcel of land more particularly described as being the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, Tp. 13 N., R. 18 W., principal Meridian of Montana.

Third—The said land was at said time a part of the unoccupied unappropriated and public domain of the United States, and being at said time unsurveyed.

The said W. B. S. Higgins entered upon said tract of land for the purpose of making for himself a home, and proceeded to erect improvements upon said tract of land, and to enclose a large portion thereof with a fence.

That thereafter he continued to occupy, hold and possess the same for, during and until he sold, transferred and assigned his interest to other parties, and that through mesne conveyances the defendant herein on or about the 6th day of January, 1881, became the owner and possessor of said tract of land.

Fourth—That said piece, parcel or tract of land was owned, held, possessed and occupied continuously between the first day of July, 1862, up to and including the date of the commencement of this action by persons who, under the laws of the United States were entitled to enter the same, either as a homestead or pre-emption entry.

Fifth—That the above described tract of land was on or about the day of, 1884, surveyed by the Surveyor-General of the State of Montana, and said survey was, on or about said date accepted by the officers of the Land Department of the United States, and that on or about the 6th day of January, 1881, the defendant herein settled upon said tract of land, having become possessor thereof by purchase from the prior occupant.

Sixth—That thereafter he applied to the officers of the United States Land Office at Helena, Montana (the same being the office in which the said lands were subject to entry) to file his pre-emption on said tract of land, and the plaintiff appeared by attorneys, and through its agents and attorneys, and contested the right of the defendant to enter the same; but notwithstanding the contest on the part of the plaintiff, made by it against the defendant herein, it was decided by the Register and Receiver of said land office, after a hearing and full proof having been made, concerning all facts connected therewith, that this defendant was entitled to enter said above described land, under the laws of the United States, and that the plaintiff herein had no right, title or interest therein, the said land being reserved from the grant, alleged in plaintiff's complaint herein filed.

Seventh—That said land was not owned by plaintiff by reason of the grant made to it by the Congress of the United States under an Act approved July 2nd, 1864. An Act entitled "An Act granting lands to aid in the construction of a railroad, and telegraph line from Lake Superior to Puget Sound on the Pacific

Coast, by the Northern Route," and was on said date actually held, occupied and possessed by a duly qualified pre-emptor, under the laws of the United States.

Eighth—That after the time when the said decision had been made by the said land office at Helena, Montana, the said plaintiff appealed therefrom to the Commissioner of the General Land Office at Washington, D. C., who, upon consideration of all the facts and circumstances of the case, and the evidence produced upon the part of the said defendant, showing his title to said land, and after the argument of counsel for both the plaintiff and the defendant showing his title to said land, the said Commissioner of the General Land Office, decided that the defendant herein was entitled to enter said land under the laws of the United States, from which decision of the Commissioner of the General Land Office, the plaintiff herein appealed to the Secretary of the Interior, who thereafter affirmed the decision of the Commissioner, and decided that this defendant was entitled to hold and possess said land, under the laws of the United States, and that the plaintiff herein had no right, title, interest, claim or demand in or to said land, or any part or parcel thereof.

Ninth—That the defendant did on the first day of May, 1889, file his Declaratory Statement No. 9986, in the United States Land Office at Helena, Montana, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, Tp. 13 N., R. 18 W., which said Declaratory Statement was accepted by the Register and Receiver of the United States Land Office at Helena, Montana, aforesaid, and that thereafter in pursuance of the Act

of Congress, approved May 27th, 1876, the defendant herein changed his pre-emption Declaratory Statement to Homestead Entry No. 4890, and paid the Register and Receiver the necessary fees therefor.

Tenth—Defendant further alleges that on or about the first day of January, 1891, he made application to the United States Land Office at Helena, Montana, in the regular way, to make final proof upon said described land, and that thereafter he advertised and gave notice in a newspaper published in the County of Missoula, that he would, on the 20th day of March, 1891, make final proof upon said tract of land, in which any persons claiming to own or hold any interest in said land were notified to appear and show cause, if any they had, why said final proof should not be made, and that on the day mentioned defendant appeared with his witnesses before the Clerk of the District Court of the Fourth Judicial District of the State of Montana (in the absence of the Judge of said Court), and proved by testimony free from exceptions, and in the manner and form prescribed by law, his title to said above described land, and that thereafter upon presenting said proof to the Register and Receiver of the United States Land Office at Helena, Montana, the same was accepted by them, and thereupon on the 28th day of March, 1891, the said Register and Receiver issued to the said defendant, a certificate under their hands, showing that this defendant was entitled to the land described herein, and he thereupon became, and now is, the owner thereof.

Eleventh—That the plaintiff herein at the time of making said final proof, made no protest or objection

to the same, and that by reason thereof the said plaintiff is now estopped from asserting any title, interest, claim or demand in or to said land, or any part or parcel thereof, and he therefore asks a judgment of this court, declaring him entitled to the land mentioned and described in plaintiff's complaint and herein described, and that he be awarded his costs in this behalf expended.

W. M. BICKFORD,
Attorney for Defendant.

STATE OF MONTANA, }
County of Missoula. } ss.

John McCormick, being first duly sworn according to law, deposes and says, that he is the defendant in the above-entitled action, that he has heard read the foregoing *complaint*, knows the contents thereof, and that the matters and things therein contained are true.

JOHN McCORMICK,

Subscribed and sworn to before me, this 31st day of March, 1891.

(Notarial Seal.)

ELMER E. HERSHEY,
Notary Public.

[Endorsed]: No. 115. Northern Pacific Railroad Company vs. John McCormick. Filed, May 25th, 1891. Geo. W. Sproule, Clerk.

Court Proceedings.

And thereafter, to-wit: on the 2nd day of November, A. D. 1891, the following further proceedings were had and entered of record herein in the words and figures, as follows, to-wit:

November Term, A. D. 1891. Monday, November 2, 1891.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States District Judge.

No. 115, Northern Pacific Railroad Company vs John McCormick.

On motion of counsel for plaintiff, the name of F. M. Dudley, Esq., ordered entered as additional counsel.

On motion of attorneys for plaintiff, it is ordered that plffs. be granted three days time in which to file demurrer or plead to answer.

Demurrer to Answer.

And thereafter, to-wit: on the 3rd day of November, 1891, the demurrer of plaintiff to the answer of defendant was filed, which said demurrer is in the words and figures, as follows, to-wit: In the Circuit Court of the United States, for the Ninth Circuit, District of Montana. Northern Pacific Railroad Company, plaintiff, vs. John McCormick, defendant. Now comes said plaintiff and demurs to the new matter and further answer contained in defendants' answer herein because the same does not state facts sufficient to constitute a defense or counter claim.

CULLEN, SANDERS & SHELTON and
F. M. DUDLEY,

Attorneys for Plaintiff.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

F. M. DUDLEY,
Atty. for Plaintiff.

[Endorsed]: No. 115. In the Circuit Court of the United States, for the Ninth Circuit, District of Montana. N. P. R. R. Co., Plaintiff, vs. Jno. McCormick, Defendant. Demurrer to Answer. Filed Nov. 3, 1891. Geo. W. Sproule, Clerk. Cullen, Sanders and Shelton, Attorneys for Plff.

Order.

And thereafter, to-wit: On November 3d, 1891, the following further proceedings were had, and entered of record herein, in the words and figures as follows, to-wit:

November Term, A. D. 1891, Tuesday, November 3d, 1891.

Court convened pursuant to adjournment.

Present: Honorable HIRAM KNOWLES, United States District Judge.

No. 115, Northern Pacific Railroad vs. John McCormick.

Demurrer to answer ordered set for argument November 4th, 1891, at 2 P. M.

Order.

And thereafter, to-wit: On the 5th day of November, 1891, the following further proceedings were had and entered of record as follows, to-wit:

November Term, A. D. 1891, Thursday, November 5th, 1891.

Court convened pursuant to adjournment.

Present: Honorable HIRAM KNOWLES, United States District Judge.

No. 115, Northern Pacific Railroad Co. vs. John McCormick.

By agreement of counsel the hearing of above cause is ordered continued for the term.

And thereafter; to-wit: On the 7th day of March, 1892, the amended answer of defendant was filed, which said amended answer is in the words and figures following, to-wit:

*In the Circuit Court of the United States, District of
Montana.*

NORTHERN PACIFIC RAILROAD COM-
PANY,

Plaintiff,

vs.

JOHN McCORMICK,

Defendant.

Amended Answer.

By way of answer to the plaintiff's complaint herein filed, the defendant denies:

That the land mentioned and described in said complaint as being the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 21, Tp. 13 N., R. 18 W., principal Meridian of Montana, was on the 21st day of February, 1872, or any date subsequent thereto public land, to which the United States had full title.

Denies—That the land was not reserved, sold or granted, or otherwise appropriated, or that the same was free from pre-emption, or other claims or rights.

Denies—That the land was in any other or different condition than hereinafter mentioned and described in this answer.

Denies—That the land mentioned and described in said complaint was, on the 6th day of July, 1882, public land of the United States, to which the United States had full title, and alleges:

That said land was at the said date appropriated in the manner hereinafter set forth, and was reserved and excepted from the grant to the Northern Pacific Railroad Company.

Denies—That by reason of the facts alleged in plaintiff's complaint, or of any other facts, the plaintiff became, on the 6th day of July, 1882, or at any other time, the owner, or seized in fee simple, or otherwise, of the land described in said complaint, and also denies, that said land then or at any time became, or that the same has ever since remained or that it now is the property of the plaintiff, or that the plaintiff is entitled either without let or otherwise to have the said land, or any part or parcel thereof.

Denies—That heretofore, on May 18th, 1889, or at any time, the plaintiff was possessed of said land, or any part or parcel thereof.

Denies—That said defendant either wrongfully or unlawfully, or in any other way entered upon said land, or that he ousted the plaintiff therefrom, or that the said defendant remains, or has ever remained wrongfully or unlawfully in the possession of said land or any part or parcel thereof.

Denies—That the plaintiff is damaged in the sum of five hundred (\$500.00) dollars, or any other sum or amount, by any act or acts done by the defendant herein.

Denies—That said land is of the value of five thousand (\$5000.) dollars, or of any other greater value than two thousand five hundred (\$2500.) dollars.

For a further answer and by way of new matter constituting a defense to plaintiff's alleged cause of action the defendant alleges:

First—That he is a citizen of the United States over the age of twenty-one years, and during all the times herein mentioned has been duly qualified to enter the land of the United States, and to make a pre-emption or a homestead entry under said laws.

That on or about the — day of January, 1864, one W. B. S. Higgins, being at said time a citizen of the United States over the age of twenty-one years, and duly qualified under the laws of the United States to make a pre-emption or homestead filing, entered into and upon that certain tract, piece or parcel of land, more particularly described as being the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, Tp. 13 N., R. 18 W., principal Meridian of Montana.

Third—The said land was at said time a part of the unoccupied unappropriated, and Public Domain of the United States, and being at said time unsurveyed.

The said W. B. S. Higgins entered upon said tract of land for the purpose of making for himself a home, and proceeded to erect improvements upon said tract of land, and to enclose a large portion thereof with a fence.

That thereafter he continued to occupy, hold and possess the same for, and during and until he sold, transferred and assigned his interest to other parties, and that through mesne conveyances, the defendant

herein on or about the 6th day of January, 1881, became the owner and possessor of said tract of land.

Fourth—That said piece, parcel or tract of land was owned, held, possessed and occupied continuously between the first day of July, 1862 up to, and including the date of the commencement of this action by persons, who under the laws of the United States were entitled to enter the same, either as a homestead or pre-emption entry.

Fifth—That the said above described tract of land was on or about theday of.....1884, surveyed by the Surveyor-General of the State of Montana, and said survey was on or about said date accepted by the officers of the Land Department of the United States, and that on or about the 6th day of January, 1881, the defendant herein settled upon said tract of land, having become the possessor thereof by purchase from the prior occupant.

Sixth—That thereafter he applied to the officers of the United States Land Office, at Helena, Montana (the same being the office in which the said lands were subject to entry), to file his pre-emption on said tract of land, and the plaintiff appeared by attorneys, and through its agents and attorneys, and contested the right of the defendant to enter the same; but notwithstanding the contest on the part of the plaintiff, made by it against the defendant, herein, it was decided by the Register and Receiver of said Land Office, after a hearing and full proof had been made, concerning all facts connected therewith, that this defendant was entitled to enter said above described land, under the laws of the United States, and that

the plaintiff herein had no right, title or interest therein, the said land being reserved from the grant, alleged in plaintiff's complaint herein filed.

Seventh—That said land was not owned by plaintiff by reason of the grant made to it by the Congress of the United States under an Act approved July 2nd, 1864. An Act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," and was on said date actually held, occupied and possessed by a duly qualified pre-emptor, under the laws of the United States

Eighth—That after the time when the said decision had been made by the said Land Office at Helena, Montana, the said plaintiff appealed therefrom to the Commissioner of the General Land Office, at Washington, D. C., who, upon consideration of all the facts and circumstances of the case, and the evidence produced upon the part of the said defendant, showing his title to the land, and after argument for both plaintiff and defendant showing the title to the said land the said Commissioner of the General Land Office, decided that the defendant herein was entitled to enter said land under the laws of the United States, from which decision of the Commissioner of the General Land Office, the plaintiff herein appealed to the Secretary of the Interior, who thereafter affirmed the decision of the Commissioner and decided that this defendant was entitled to hold and possess said land, under the laws of the United States, and that the plaintiff herein had no right, title, interest, claim or

demand whatsoever in or to said land, or any part or parcel thereof.

Ninth—That the defendant did on the first day of May, 1889, file his Declaratory Statement, No. 9986, in the United States Land Office at Helena, Montana, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, Tp. 13 N., R. 18 W., which declaratory statement was accepted by the Register and Receiver of the United States Land Office at Helena, Montana, aforesaid, and that thereafter, in pursuance of the Act of Congress approved May 27th, 1876, the defendant herein changed his pre-emption declaratory statement to Homestead Entry, No. 4890, and paid the Register and Receiver the necessary fees therefor.

Tenth—Defendant further alleges that on or about the first day of January, 1891, he made application to the United States Land Office at Helena, Montana, in the regular way, to make final proof upon said described land, and that thereafter he advertised and gave notice in a newspaper published in the County of Missoula, that he would, on the 20th day of March, 1891, make final proof upon said tract of land, in which any persons claiming to own or to hold any interest in said land were notified to appear and show cause, if any they had, why said final proof should not be made, and that on the day mentioned defendant appeared with his witnesses before the Clerk of the District Court of the Fourth Judicial District of the State of Montana, (in the absence of the Judge of said court), and proved by testimony free from exceptions and in the manner and form prescribed by law, his title to said above described

land, and that thereafter upon presenting said proof to the Register and Receiver of the United States Land Office at Helena, Montana, the same was accepted by them, and thereupon on the 28th day of March, 1891, the said Register and Receiver issued to the said defendant, a certificate under their hands, showing that this defendant was entitled to the land described herein, and he thereupon became and now is the owner thereof.

Eleventh—That at the time of making said final proof the plaintiff herein made no objection thereto, but allowed said proof to be made without protest or objection, and that said proof, after being so accepted and approved by the said Register and Receiver, was by them (as affiant is informed and believes) forwarded in due course of business to the Honorable Commissioner of the General Land Office at Washington, D. C., and was by him accepted and approved, and on or about the 16th day of November, 1891, the President of the United States issued to this defendant, under his hand, and the great seal of the United States, a patent for said land, and that by reason of said patent and compliance with the laws of the United States, he is now the owner and entitled to the possession of all of said tract of land without let or hindrance from said plaintiff.

TOOLE & WALLACE & W. M. BICKFORD,

Attorneys for Defendant.

STATE OF MONTANA, }
County of Missoula. }^{ss.}

John McCormick being first duly sworn, according to law, deposes and says: That he is the defendant in

the above-entitled action, that he has heard read the foregoing *complaint*, and knows the contents thereof, that the matters and things therein contained are true.

JOHN McCORMICK.

Subscribed and sworn to before me this 4th day of March, A. D. 1892.

(Notarial Seal.)

ELMER E. HERSHEY,
Notary Public.

Service of above answer by copy, accepted this 7th day of March, A. D. 1892.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiff.

[Endorsed]: No. 115. In the Circuit Court of the U. S. District of Montana. Northern Pacific R. R. Co. vs. Jno. McCormick. Answer. Filed Mar. 7, 1892. Geo. W. Sproule, Clerk.

And thereafter, to-wit: On the 12th day of April, 1892, the demurrer to the amended answer was filed herein, which said demurrer is in words and figures following:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff, vs. John McCormick, Defendant.

Demurrer to Amended Answer.

Now comes the above-named plaintiff, and demurs to the amended answer of the defendant, on file in this action, for cause of such demurrer, says: That said

amended answer does not state facts sufficient to constitute a defense or counter claim.

CULLEN, SANDERS & SHELTON,
F. M. DUDLEY,

Attorneys for Plaintiff.

I hereby certify that the above demurrer is, in my opinion, well founded in point of law.

F. M. DUDLEY,
Of Counsel for Plaintiff.

Copy received April 12th, 1892,

TOOLE & WALLACE.

[Endorsed]: No. 115. In the Circuit Court of the United States, for the Ninth Circuit, District of Montana. N. P. R. R. Co., Plaintiff, vs. John McCormick, Defendant. Demurrer to amended answer. Filed April 12th, 1892. Geo. W. Sproule, Clerk. Cullen, Sanders & Shelton, Attorneys for Plaintiff.

And, thereafter, to-wit: On the 20th day of June, 1892, the following further proceedings were had and entered of record, in the words and figures following, to-wit:

April Term, 1892. Monday, June 20th, 1892.

Court convened pursuant to adjournment.

Present: HON. HIRAM KNOWLES, United States District Judge.

No. 115, Northern Pacific Railroad Co. vs. John McCormick.

By consent and agreement of the respective parties, demurrer submitted on briefs to be hereafter filed.

Order Overruling Demurrer to Amended Answer.

And, thereafter, to-wit: On the 3rd day of April, 1893, the following further proceedings were had and entered of record herein in the words and figures following, to-wit:

April Term, 1893. Monday April 3rd, 1893.

Court convened pursuant to adjournment.

Present: HON. HIRAM KNOWLES, U. S. District Judge.
No. 115, Northern Pacific Railroad Co. vs. John McCormick. -

This cause heretofore submitted to the Court upon the demurrer of plaintiff to the amended answer, came on this day for the decision of the Court, and after due consideration it is ordered that said demurrer be, and the same hereby is overruled.

Thereupon plaintiff asked leave to file replication to new matter in answer, and thereupon plaintiff granted twenty days from this day to file said replication.



And on said 3rd day of April, 1893, the opinion of the Court in overruling said demurrer was filed, which said opinion is in the words and figures following:

In the Circuit Court, District of Montana.

NORTHERN PACIFIC RAILROAD COM-
PANY,

Plaintiff,

vs.

JOHN McCORMICK,

Defendant.

April 3, 1893.

Opinion.

KNOWLES, District Judge.

This is an action to recover from the defendant the possession of a certain tract of land. Sufficient facts are set forth in the complaint to show that plaintiff received from the United States a grant of twenty odd sections of public land, not mineral, on each side of the line of its railroad as definitely fixed through the State of Montana, when the same should not be sold, granted, reserved or otherwise appropriated, and free from pre-emption or other claims or rights, at the time of the said definitely fixing of said line. In the complaint it is alleged as follows:

“That the general route of said railroad extending through the Territory of Montana was duly fixed February 22, 1872, and that the following described land, to-wit: south half of northwest quarter, and north half of southwest quarter, of section 21, township 13 north, of range 18 west, P. M., Montana, was on and within forty miles of the general route of said railroad, so fixed as aforesaid, and that said land was on said February 21, 1872, public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or

other claims or rights. That thereafter, to-wit, on July 6, 1882, plaintiff definitely fixed the line of its said railroad extending opposite to and past said south half of township 13 north, of range 18 west, P. M. Montana, and filed a plat thereof in the office of the Commissioner of the General Land Office. That said land is on and within forty miles of the said line of railroad so definitely fixed as aforesaid. * * * That said land was on said day public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights. That by reason of the foregoing facts said plaintiff became, on July 6, 1882, the owner and seized in fee simple of said land and said land then became, and has ever since remained, and now is, the property of the plaintiff, to which the plaintiff is entitled without let or hindrance from said defendant. That the United States has neglected, failed and refused to issue to said plaintiff a patent for said land, and that heretofore, to-wit, May 1, 1889, the said plaintiff being possessed of the said premises, the said defendant did wrongfully and unlawfully, without consent and against the will of the plaintiff, entered thereon and ousted plaintiff therefrom."

To those allegations, in his answer, the defendant made the following denials, to-wit:

"First—That the land mentioned and described in said complaint * * * was on the 21st day of February, or at any date subsequent thereto, public land to which the United States had full title. That the land was not reserved, sold, granted or otherwise ap-

propriated, and that the same was free from pre-emption or other claims or rights. That the land mentioned in said complaint was on the 6th day of July, 1882, public land of the United States, to which the United States had full title. That by reason of the facts alleged in plaintiff's complaint, or any other facts, the plaintiff became on the 6th day of July, 1882, or at any other time, the owner, or seized in fee simple or otherwise, of the land described in said complaint; and also denies that said land then or at any other time became, or that the same has ever since remained, or that it now is, the property of the plaintiff, or that the plaintiff is entitled, either without let or otherwise, to have said land, or any part or parcel thereof. That on May 18, 1881, or at any time, the plaintiff was possessed of said land, or any part or parcel thereof."

It does appear to me that these denials in the answer of defendant do put in issue the allegations of the complaint showing title in plaintiff. When such is the case, the defendant can prove any facts which will tend to show that plaintiff has no title to the land in dispute. In the case of *Marshal v. Shafter*, 32 Cal. 177, the court said:

"It is proper at this point, however, to say that it is settled beyond controversy in this state that the defendant may, under the general denial, give in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter."

This doctrine was fully supported in the case of *Bruck v. Tucker*, 42 Cal. 346. It was there held that when the question of title is raised by general issue

the setting up of title by defendant in himself in the answer amounts to nothing. The practice pertaining to an issue of title raised by a general denial was applied to such an issue raised by a specific denial under the code of practice prevailing in Montana, by the Supreme Court of the Territory, in the cases of *Meyendorf v. Frohner*, 3 Mont. 282, 323, 324, and *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. Rep. 409. In the last case the question was fully considered, and there can be no doubt that this is the practice in this State upon this question at this time. The practice of the State courts must control that of this court in actions at law such as this.

The defendant set forth facts as new matter showing title in himself. Plaintiff demurred to the answer, and contends that the defendant is bound by these allegations, presented to show title in himself. Plaintiff has cited several cases to support his position that the defendant is bound by this new matter, and the court can consider them and determine therefrom which party is entitled to recover. In my opinion the cases are not in point. They refer to cases where the complaint states the particular title under which plaintiff claimed, and the sources of the same. In them it was held that plaintiff was confined to the title as alleged. It is a familiar maxim in ejectment that the plaintiff must recover on the strength of his own title, and not upon the weakness of that of the defendant. Where the plaintiff's title is denied it might turn out that the defendant would have no title, and yet the plaintiff not entitled to recover, owing to some defect in his own. I do not think it necessary

to express any views upon the force and bearing of the facts set up as new matter in the answer as, with my view of the practice under the denials in the answer the defendant would not be confined to the same, but could prove other or additional facts which would have a tendency to show that plaintiff has no title. For these reasons the demurrer is overruled.

And thereafter, to-wit, on the 17th day of April, 1893, the plaintiff filed its Replication herein, which said replication is in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD COM-
PANY,

Plaintiff,

vs.

JOHN McCORMICK,

Defendant.

Replication.

Comes now the plaintiff, and for reply to the new matter contained in the second or amended answer of said defendant herein, says:

I.

That as to whether or not said defendant during all the times in said answer mentioned was duly qualified or was qualified at all, to enter upon the lands of the United States, or make a pre-emption or homestead

entry upon said land, the said plaintiff have not knowledge or information sufficient to form a belief and therefore *denies* the same.

II.

That as to whether or not on or about the day of January, 1864, or at any time, said W. B. S. Higgins was a citizen of the United States over the age of twenty-one years, or was duly qualified, or was qualified, at all to enter upon the lands of the United States, and to make a pre-emption or homestead filing, and as to whether or not said Higgins entered into or upon said land described in said answer, said plaintiff has not knowledge or information sufficient to form a belief, and therefore denies the same.

III.

Said plaintiff admits that said lands was in 1864, a part of the unoccupied, unappropriated and unsurveyed public domain of the United States, but as to whether or not the said W. B. S. Higgins entered upon said land for the purpose of making himself a homestead, or at all, and whether or not he proceeded to erect improvements upon said land and enclose a large portion, or any thereof, by a fence, or as to whether or not he thereafter continued to hold and possess the same as alleged in said answer, or at all, said plaintiff has not knowledge or information sufficient to form a belief, and therefore denies the same.

IV.

The plaintiff denies that said W. B. S. Higgins sold, transferred or assigned any interest in or to said land

to other parties, or that he then, or ever had any interest whatsoever in or, to said land; and further denies that by a mesne conveyance to said defendant, on or about the 6th day of January, 1881, or at all, defendant became the owner and possessor of said tract of lands.

V.

Said plaintiff denies that said piece, parcel or tract of land was owned, held, possessed and occupied continuously between the first day of July, 1862, up to and including the date of the commencement of this said action by any person or persons who, under the laws of the United States, were entitled to enter the same either as a homestead or pre-emption entry, and alleges that said lands were at all said times unappropriated public lands of the United States, except for the interest of plaintiff.

VA.

That as to whether or not said lands was occupied continuously between the first day of July, 1862, and up to and including the date of the commencement of this action, by persons who, under the laws of the United States, were entitled to enter the same either as homestead or pre-emption entry, or whether or not said land was occupied at all by any person whosoever this defendant has not knowledge or information sufficient to form a belief, and therefore denies the same.

VI.

That as to whether or not said defendant, on or about the 6th day of January, 1881, or at all, settled

upon said tract of land, this plaintiff has not knowledge or information sufficient to form a belief and therefore denies the same.

Said plaintiff further denies, that the said defendant became the possessor thereof by purchase from prior occupants.

VII.

Said plaintiff avers, that at the time of the hearing before the Register and Receiver of the United States District Land Office, for the district in which said land was situated, and at the time of the decision of the Commissioner of the General Land Office and of the Secretary of the Interior, alleged in said answer, this defendant was the owner of in fee of the land described in said answer, and the said Register and Receiver and Commissioner of the General Land Office and the Secretary of the Interior, had no jurisdiction over said land for the purpose of rendering said decision, or at all.

And that said land had not been public land of the United States, open to settlement or entry under the pre-emption, homestead or other land laws of the United States, since the first day of February, 1872.

Wherefore, plaintiff prays judgment against said defendant as in its complaint herein.

F. M. DUDLEY, CULLEN & TOOLE,
Attorneys for Plaintiff.

STATE OF MONTANA, }
 County of Lewis and Clarke. } ss.

F. M. Dudley, being first duly sworn, says:

The above-named plaintiff is a corporation, and I am an officer thereof, to-wit, I am its general land attorney. I have read the foregoing replication and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information and belief.

F. M. DUDLEY.

Subscribed and sworn to before me, this 14th day of April, 1893.

(Seal.)

W. E. CULLEN,
 Notary Public.

Service of the foregoing replication accepted this 17th day of April, A. D. 1893.

TOOLE & WALLACE,
 Attorneys for Defendant.

[Endorsed]: Title of Court and Cause. No. 115.
 Replication. Filed April 17, 1893. Geo. W. Sproule,
 Clerk.

Court Proceedings.

And thereafter, to-wit, on the 6th day of November, 1893, upon a call of the calendar, said cause was ordered passed.

And thereafter, to-wit, on the 4th day of December, 1893, said cause, being called on the calendar, was ordered passed until called up.

And thereafter, to-wit, on the 2d day of April, 1894, the following further proceedings were had and

entered of record herein in the words and figures as follows, to-wit:

April Term, A. D., 1894, Monday, April 2, 1894.

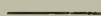
Court convened pursuant to adjournment.

Present: Hon. HIRAM KNOWLES, U. S. District Judge.

No. 115. Northern Pacific Railroad Co., vs. John McCormick.

Ordered that the names of Toole and Wallace be entered as of counsel for defendant.

Cause ordered passed.



And thereafter, to-wit, on the 28th day of May, 1894, the defendant filed his motion for judgment on the pleadings which said motion is in the words and figures, as follows, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD COM-	}
PANY,	
Complainant,	
vs.	
JOHN McCORMICK,	}
Defendant.	

Motion for Judgment on the Pleadings.

Now, comes the defendant in the above-entitled action and moves the Court for judgment on the pleadings herein, for that the said plaintiff admits the issuance of the United States patent, set forth in the

said answer, and raises no material issue for trial; and for that the said patent is conclusive of all the matters sought to be presented by the replication.

W. M. BICKFORD, TOOLE & WALLACE,

Attorneys for Defendant.

[Endorsed]: Title of Court and Cause. No. 115. Motion for Judgment on the Pleadings. Filed May 28, 1894. Geo. W. Sproule, Clerk.

Court Proceedings.

And thereafter, to-wit, on the 29th day of May, 1894, the following further proceedings were had and entered of record herein, in the words and figures, as follows, to-wit:

April Term, A. D. 1894, Tuesday, May 29, 1894.

Court convened pursuant to adjournment.

Present: Honorable HIRAM KNOWLES, U. S. District Judge.

No. 115, Northern Pacific Railroad Co. vs. John McCormick.

Ordered that defendant's motion for judgment on the pleadings be and the same hereby is passed.

And thereafter, to-wit: on the 11th day of June, 1894, the following further proceedings were had and entered of record herein, in the words and figures as follows, to-wit:

April Term, A. D. 1894, Monday, June 11, 1894.

Court convened pursuant to adjournment.

Present: Honorable HIRAM KNOWLES, U. S. District Judge.

No. 115, Northern Pacific Railroad Co. vs. John McCormick.

Ordered that motion for judgment on pleadings be and the same hereby is set for hearing June 22, 1894.

And thereafter, to-wit: on the 25th day of June, 1894, the following further proceedings were had and entered of record herein, in the words and figures as follows, to-wit:

April Term, A. D. 1894, Monday, June 25th, 1894.

Court convened pursuant to adjournment.

Present: Honorable HIRAM KNOWLES, U. S. District Judge.

No. 115, Northern Pacific Railroad Co. vs. John McCormick.

Ordered that hearing of motion in this cause, be and the same hereby is set for Wednesday, June 27th, 1894.

And thereafter, to-wit: On the 27th day of June, 1894, hearing of said cause was continued.

And thereafter, to-wit: On the 28th day of June, 1894, the following further proceedings were had and entered of record in the words and figures as follows:

April Term, A. D. 1894, Thursday, June 28th, 1894.

Court convened pursuant to adjournment.

Present: Honorable HIRAM KNOWLES, U. S. District Judge.

No. 115, Northern Pacific Railroad Co. vs. John McCormick.

This cause came up regularly for hearing this day, as the motion of defendant for judgment, on the plead-

ings, Messrs. Toole & Wallace appearing as counsel for defendant, and Messrs. Cullen & Toole appearing as counsel for plaintiff, and after argument of counsel, cause submitted to the Court for consideration and decision.

And thereafter, to-wit: on the 3rd day of January, 1895, the following further proceedings were had and entered of record herein in words and figures as follows to-wit:

November Term, A. D. 1894, Thursday June 3, 1894.
Court convened pursuant to adjournment.

Present: HON. HIRAM KNOWLES, U. S. District Judge.
No. 115, Northern Pacific Railroad Co. vs. John McCormick.

Order Sustaining Motion for Judgment.

This cause heretofore submitted to the Court on the motion of defendant for judgment on the pleadings, came on this day regularly for the judgment and decision of the Court, and after due consideration it is ordered that said motion be and the same hereby is sustained.

To which ruling of the Court, plaintiff then and there excepted and exception noted.

And thereafter, to-wit: on the 19th day of January 1895, judgment was duly entered herein in the words and figures as follows:

*In the United States Circuit Court of the Ninth Circuit of
the United States, in and for the District of Montana.*

NORTHERN PACIFIC RAILROAD Co.,

Plaintiff,

vs.

JOHN McCORMICK,

Defendant.

Judgment.

Be it remembered: that the above action having been duly begun in the court aforesaid by complaint by the plaintiff therein filed on the 12th day of January, 1891, and the defendant having thereafter duly appeared and answered therein, and afterwards no replication having been filed to said answer, having moved the Court for a judgment on the said pleadings, to-wit: the said complaint and answer, and the said motion having come on for the consideration of the Court and been argued by the respective counsel of both plaintiff and defendant herein, and the Court after argument and due consideration having sustained the said motion,

Now, therefore, pursuant to the law and the premises it is hereby ordered and adjudged that the plaintiff's complaint be dismissed and that it recover nothing by this action; that the defendant be adjudged as entitled to the possession of the demanded premises, and that he recover of plaintiff his costs herein taxed at \$19.45.

Signed, passed and entered in open court this 19th day of January, 1895, one of the days of the regular November, 1894, term of the said court.

Entered January 19th, 1895.

GEO. W. SPROULE,
Clerk.

Attest a true and correct copy of judgment.

(Seal.) GEO. W. SPROULE,
Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, in and for the District of Montana.*

NORTHERN PACIFIC RAILROAD Co.	}	No. 115.
vs.		
JOHN McCORMICK.		

Certificate to Judgment Roll.

George W. Sproule, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 19th day of Jan. 1895.

(Seal of the United States Circuit Court,
District of Montana.)

GEO. W. SPROULE,
Clerk.

[Endorsed]: Title of Court and Case. No. 115.
Judgment Roll. Filed January 19th, 1895. Geo. W.
Sproule, Clerk. Recorded Judgment Register Book
No. 1, page 132.

And thereafter, to-wit, on the 12th day of March, 1895, the plaintiff filed an Assignment of Error herein, which said assignment of error is in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD COM-	}
PANY,	
	Plaintiff.
	vs.
JOHN McCORMICK,	}
	Defendant.

Assignment of Error.

Comes now the Northern Pacific Railroad Company, by its attorneys, and says, that on the records and proceedings in the above-entitled cause, and in the rendition of judgment herein there is manifest error, as follows, to-wit:

I.

The above court held and determined that the complaint and replication were insufficient to show the title to the S. $\frac{1}{2}$ of the N W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the S W. $\frac{1}{4}$ of Section 21, Township 13 N., R. 18 W., P. M. Montana, had vested in the Northern Pacific Railroad Company, under the Act of Congress, approved July 2, 1864.

II.

The above court failed and refused to hold that it appeared from the pleadings herein that the S. $\frac{1}{2}$ of the N W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the S W. $\frac{1}{4}$ of Section 21,

Township 13 N., R. 18 W., Montana, was, except for the claim of the Northern Pacific Railroad Company thereto, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from redemption and other claim and rights at the date of the grant to said Northern Pacific Railroad Company, July 2, 1864, at the time of the line of general route of said railroad co-terminus with said land was fixed, February 21, 1872, and at the time the line of said railroad co-terminus with said land was definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office, July 6, 1882; and failed and refused to hold that the legal title vested in the said railroad company by said Act of Congress, approved July 2, 1864, attached to said land July 6, 1882, as of date of said granting act.

III.

The above Court failed to hold and determine that the facts set forth in the complaint and replication herein showed the patent for the said S. $\frac{1}{2}$ of the N W. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the S W. $\frac{1}{4}$ of Section 21, Township 13 N., R. 18 W., Montana, issued to the defendant by the United States, was so issued without authority of law, and is void.

IV.

The above Court held that the patent issued by the United States to the said defendant on or about November 16, 1891, as in the answer herein alleged, purporting to convey to said defendant the S. $\frac{1}{2}$ of the N.

W. $\frac{1}{4}$, and W. $\frac{1}{2}$ of the S W. $\frac{1}{4}$ of Section 21, Township 13 N., R. 18 W., Montana, was conclusive in this action that the legal title to said land had vested in the said defendant.

V.

The above Court held that it did not appear from the pleadings herein that the said plaintiff was entitled to recover judgment in this action for the possession of the said S. $\frac{1}{2}$ of the N W. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the S W. $\frac{1}{4}$ of Section 21, Township 13 N., R. 18 W., Montana.

VI.

The above Court held that the said defendant was entitled to judgment on the pleadings in the above action.

VII.

The entry of judgment in favor of the said defendant and against the plaintiff.

VIII.

The said Court held that no replication had been filed to the answer in the above-entitled cause.

Wherefore the said plaintiff, the Northern Pacific Railroad Company, prays that the judgment herein entered by the said Court on the 19th day of January, A. D. 1895, may be set aside and reversed, and the cause remanded to the United States Circuit Court for the District of Montana, with instructions to proceed with the trial thereof.

F. M. DUDLEY, CULLEN & TOOLE,

Attorneys for Plaintiff.

[Endorsed]: Title of Court and Case. No. 115.
Assignment of Error. Filed March 12, 1895. George
W. Sproule, Clerk.

And thereafter, to-wit, on the 18th day of March, 1895, the plaintiff filed a bond on writ in error herein, which said writ of error in error is in words and figures as follows to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, vs. JOHN McCORMICK, Defendant in Error.	}	}
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Bond on Writ of Error.

Know All Men By These Presents, that we, the Northern Pacific Railroad Company, as principal, and S. T. Hauser and A. M. Holter, both of the City of Helena, as sureties, County of Lewis and Clarke, and State of Montana, are held and firmly bound unto the above-named John McCormick in the sum of three hundred dollars (\$300) to be paid to the said John McCormick, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, the above-named Northern Pacific Railroad Company has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment rendered in the above-entitled action by the Judge of the United States Circuit Court, of the Ninth Circuit, within and for the District of Montana.

Now, therefore, the condition of this obligation is such, that if the above named, the Northern Pacific Railroad Company, shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,

By CULLEN & TOOLE,

Its Attys. (Seal.)

S. T. HAUSER. (Seal.)

A. M. HOLTER. (Seal.)

Sealed, delivered, taken and acknowledged, this 18th day of March, 1895, before me.

UNITED STATES OF AMERICA, } ss.
District of Montana. }

S. T. Hauser and A. M. Holter, being first duly and severally sworn, each for himself, says: I am one of the sureties who subscribed the foregoing bond; I am worth the amount mentioned therein as the penal sum thereof, over and above all my debts and liabilities, and exclusive of my property exempt by law from execution in the State of Montana.

S. T. HAUSER.

A. M. HOLTER.

Subscribed and sworn to before me, this 18th day of March, A. D. 1895. .

W. E. CULLEN,
Notary Public, Montana.

(Notarial Seal.)

[Endorsed]: Title of Court and Case. No. 115. Bond of Writ of Error in Error. Within bond approved, this 18th day of March, 1895. Hiram Knowles, U. S. District Judge. Filed March 18, 1895. Geo. W. Sproule, Clerk.

Writ of Error.

UNITED STATES OF AMERICA—SS.

The President of the United States of America, to the Judges of the Circuit Court of the United States, for the District of Montana, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between the Northern Pacific Railroad Company, plaintiff, and John McCormick, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Northern Pacific Railroad Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals, for the Ninth Circuit, at the courtroom of said court, together

with this writ, so that you have the same at said place before the Justices aforesaid, on the 17th day of April next, in the said United States Circuit Court of Appeals, for the Ninth Circuit, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals, for the Ninth Circuit, may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

(Seal.)

GEO. W. SPROULE,

Clerk.

The above writ of error is hereby allowed.

HIRAM KNOWLES,

U. S. Dist. Judge.

The answer of the Judges of the Circuit Court of the United States, Ninth Circuit, for the District of Montana. The record and proceedings of the plaintiff whereof mention is within made with all things touching the same, we certify under the seal of said court, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained in a certain schedule to this writ annexed as within we are commanded.

By the Court.

(Seal.)

GEO. W. SPROULE,

Clerk.

[Endorsed]: Writ of Error. Filed March 20th, 1895. Geo. W. Sproule, Clerk. Copy Deposited for the Defendant in Error, in the Clerk's Office, U. S. Circuit Court, District of Montana.

Citation.

UNITED STATES OF AMERICA—SS.

To John McCormick, Defendant in Error, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 17th day of April, A. D., 1895, pursuant to a writ of error issued out of the Clerk's office, United States Circuit Court, for the District of Montana, wherein the Northern Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said cause and court mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable HIRAM KNOWLES, United States District Judge, for the District of Montana, this 18th day of March, A. D. 1895, and of the Independence of the United States, the one hundred and nineteenth.

HIRAM KNOWLES,

U. S. Dist. Judge.

Service of the foregoing citation accepted this 20th day of March, A. D. 1895.

TOOLE & WALLACE,

Attorneys for Defendant.

[Endorsed]: Citation. Filed March 20, 1895. Geo. W. Sproule, Clerk.

UNITED STATES OF AMERICA, }
 District of Montana. } ss.

*In the Circuit Court of the United States, Ninth Circuit,
 District of Montana.*

Clerk's Certificate.

I, George W. Sproule, Clerk of the said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, that the foregoing volume, consisting of 46 pages, numbered consecutively from 1 to 46, inclusive, is a true and correct and complete transcript of the records, process, pleadings, orders and judgment in said cause, and of the whole thereof as appear from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error, together with proof of service thereof.

I further certify that the costs of the transcript of record amounts to the sum of \$36.50, and that the same has been paid by the said plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court, at Helena, in the District of Montana, this 11th day of April, A. D. 1895.

(Seal.)

GEO. W. SPROULE,
 Clerk.

[Endorsed]: No. 226. U. S. Circuit Court of Appeals, Ninth Circuit. Northern Pacific Railroad Company, Plaintiff in Error, vs. John McCormick, Defendant in Error. Transcript of Record. In error to the Circuit Court of the United States for the District of Montana.

Filed April 15th, 1895.

F. D. MONCKTON,
Clerk.